84-1082

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No. 84-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

OPPENHEIMER & CO., INC.,

Appellant,

—v.—

MARCIA A. YOUNG,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

APPENDIX TO JURISDICTIONAL STATEMENT

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December 1984

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APPENDIX A

APPENDIX A

OPPENHEIMER & CO., INC.,

Petitioner,

—v.—

MARCIA YOUNG,

Respondent.

No. 64140

Supreme Court of Florida

Sept. 27, 1984

Stanley A Beiley, Richard E. Brodsky and David S. Garbett of Paul, Landy, Beiley & Harper, P.A., Miami, for petitioner.

Mercedes C. Busto of Bailey & Dawes, Miami, for respondent.

SHAW, Justice.

This is a petition to review *Young* v. *Oppenheimer & Co.*, 434 So.2d 369 (Fla. 3d DCA 1983), on the ground it conflicts with *Raymond, James & Associates* v. *Maves*, 384 So.2d 716 (Fla. 2d DCA 1980), and *Merrill Lynch Pierce Fenner & Smith, Inc.* v. *Melamed*, 405 So.2d 790 (Fla. 4th DCA 1981). We have jurisdiction. Art. V, §3(b)(3), Fla. Const.

Respondent Young sued petitioner Oppenheimer claiming Oppenheimer violated the Florida Securities Act, chapter 517, Florida Statutes (1981), and committed common law fraud, negligence, and breach of fiduciary duty in handling Young's brokerage account. The trial court granted Oppenheimer's motion to compel arbitration on the basis of an agreement between the parties requiring arbitration of disputes. In doing so, the trial court relied on *Melamed* for the proposition that the Federal Arbitration Act compelled arbitration. The district court granted a writ of certiorari and quashed the trial court's order on the basis that the Florida Securities Act extends the same civil remedies as the laws of the United States for the purchasers of securities in interstate

commerce and that United States law precludes the enforcement of an arbitration agreement when a dispute concerns securities in interstate commerce. *Shearson, Hammell & Co.*, v. *Vouis*, 247 So.2d 733 (Fla. 3d DCA 1971).

Petitioner first urges that section 517.241, Florida Statutes (1981) does not contain an express prohibition against arbitration of disputes arising under the Florida Securities Act and that our decision is controlled by section 682.03, Florida Statutes (1981), which provides that arbitration agreements are valid, irrevocable, and enforceable. In support, petitioner points out that there is a strong public policy favoring arbitration as an alternative to judicial litigation of disputes. Petitioner concedes that the arbitration agreement would not be enforceable under federal securities laws but nevertheless urges that it should be enforced under state law.[1] We agree with much of petitioner's argument but not its conclusion. Arbitration agreements are valid, irrevocable, and enforceable and public policy favors arbitration as an alternative to litigation. Nevertheless, we are persuaded that it was the intent of the legislature, in enacting the Florida Securities Act, to rely on federal laws and enforcement efforts in the securities field and to cooperate with those efforts in formulating Florida law. Prior to the enactment by Congress in May 1933 of the Securities Act of 1933, regulation of securities was the responsibility of the states and all states, except Nevada, had laws governing securities transactions.[2] Section 18 of the Securities Act preserved the role of the states in

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1 Prior to initiating suit in state court, respondent brought suit in federal district court on both federal and state causes of action. The state cause of action was dismissed for lack of pendent jurisdiction. Respondent urges that petitioner waived its right to arbitration by failing to invoke the arbitration agreement in federal court. Petitioner counters, and we agree, that it would have been pointless to invoke the agreement in federal court because federal law prohibits enforcement of such agreements where the dispute concerns securities in interstate commerce. *Wilko* v. *Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953).

2 For a contemporaneous discussion of the impact of the Securities Act of 1933 and the Securities Exchange Act of 1934 on state blue sky

regulating securities transactions. The Florida Legislature reacted almost immediately to the entry of the federal government into the securities field by enacting chapter 16174, Laws of Florida (1933). Sections 4, 5, and 6 of chapter 16174 are pertinent to our inquiry. Section 4[3] provided not only for cooperation with federal authorities regulating securities transactions but, to the degree possible under state law, provided for the actual application of federal laws and regulations to the sale of securities intrastate. Section 5[4] granted to purchasers of securities the same civil remedies provided by laws of the United States for purchasers of securities under such federal laws. Section 6[5] granted jurisdiction to the courts of this state to hear civil suits concerning securities

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laws, see Smith, *State Blue Sky Laws and the Federal Securities Acts*, 34 Mich. L. Rev. 1135 (1936).

3 Section 4 reads:

The Securities Commission shall have power to make any reasonable rules and regulations which it may deem necessary to co-operate effectively with the Federal Trade Commission or any other agency of the United States Government, which may have supervision or control over the sale of securities in Interstate Commerce under any law of the United States, now or hereafter in force, and to apply to intrastate sales or offerings such Federal laws and/or regulations applicable to such sales or offerings in interstate commerce, as the Commission may deem necessary for the proper conduct of such intrastate sales or offerings, and not in conflict with the laws of this State.

4 Section 5 reads:

The same civil remedies provided by laws of the United States now or hereafter in force, for the purchasers of securities under any such laws, in interstate commerce, shall extend also to purchasers of securities under Chapter 14899, Laws of Florida, Acts of 1931, entitled "An Act regulating the sale of securities and to make uniform the law relating thereto, and to repeal statutes which are inconsistent herewith" and to acts amendatory thereof, either expressly or by implication.

5 Section 6 reads:

When not in conflict with the constitution or laws of the United States, the courts of this State shall have the same jurisdiction over civil suits instituted in connection with the sale or offer of sale of securities under any laws of the United States, now or hereafter in force, as they may have under similar cases instituted under the laws of the State of Florida.

violations of federal laws to the degree the courts had jurisdiction to hear civil suits concerning securities violations of the laws of Florida. It is clear from the above that the legislature intended that Florida securities laws be hand-in-glove with federal securities laws and that Florida purchasers of securities be granted the full range of civil remedies offered by both Florida and federal securities laws. It is a well established rule of statutory construction that statutes or parts of statutes borrowed from other jurisdictions will normally be given the same construction in Florida courts as the prototype statute is given by courts in other jurisdictions. *Flammer* v. *Patton*, 245 So.2d 854 (Fla. 1971). This rule is, of course, not binding and is subordinate to the cardinal principle that legislative intent is the polestar of statutory construction. *Tyson* v. *Lanier*, 156 So.2d 833 (Fla. 1963). Here, however, the rule is particularly apt because we have a clear statement from the legislative text that the legislature intended to maintain close consonance with federal legislation. To our mind, this specific legislative intent in a particular field of law carries more weight than the general declaration in section 682.03 that arbitration agreements are valid, irrevocable, and enforceable. Thus, we agree with the district court that we should follow *Wilko* v. *Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953) in holding that an arbitration agreement concerning disputes in securities is unenforceable. We are also influenced by the very practical consideration that holding otherwise would waste judicial resources. Normally, both federal and state causes of action based on security violations in interstate commerce may be heard in either federal or state courts. This is the most economical disposition available and serves both federal and state interests. The adoption of a rule that the state cause of action is subject to arbitration, while the federal cause of action is not, would lead to an uneconomical bifurcation of proceedings.[6]

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[6] Petitioner suggests that the *Wilko* decision would be different were it decided today. We are aware of the increased interest in finding alternatives to judicial litigation and that arbitration is a suitable method of resolving many disputes, Rehnquist, *A Jurist's View of Arbitration*, 32 Arb.J. 1 (1977). If the Court were to recede from *Wilko* by

Petitioner next urges that the Federal Arbitration Act (FAA) preempts the question of arbitration of disputes concerning interstate commerce and that the supremacy clause mandates that we enforce the arbitration agreement. In support, petitioner relies most heavily on *Southland Corp.* v. *Keating*, — U.S. —, 104 S.Ct. 852, 79 L.Ed. 2d 1 (1984), but also cites *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed. 2d 270(1974), *Kroog* v. *Mait*, 712 F.2d 1148 (7th Cir. 1983), *cert. denied*, — U.S. —, 104 S.Ct. 1001, 79 L.Ed. 2d 233 (1984), *Melamed*, and *Maves*, for the same proposition. In *Keating* v. *Superior Court of Alameda County*, 31 Cal.3d 584, 183 Cal. Rptr. 360, 645 P.2d 1192 (1982), the California Supreme Court held that claims asserted under the state's Franchise Investment Law were not arbitrable and that the state law did not contravene the provisions of the FAA calling for the enforcement of arbitration agreements when the dispute involved interstate commerce. In so holding, the court noted that "California's policy of protecting judicial remedies . . . was patterned after, and consistent with, federal policy in the analogous area of securities investment." *Id.* at 1202-03. In reversing the California Supreme Court, the *Southland* Court held that the California law was contrary to the FAA and thus violated the supremacy clause. By footnote, the Court rejected the analogy drawn with the federal securities law and the reliance on *Wilko*:

> The question in *Wilko* was not whether a state legislature could create an exception to §2 of the Arbitration Act, but rather whether Congress, in subsequently enacting the Securities Act, had in fact created such an exception.

Southland, 104 S.Ct. at 864 n.11. Petitioner urges that *Southland* is directly on point and dispositive of the issue before us because, in petitioner's view, *Southland* holds that a

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holding that arbitration agreements could be enforced to resolve disputes concerning interstate securities transactions, our decision would be different. In this connection, we note that the Court has recently agreed to review a case presenting either the issue here or, in a larger sense, the *Wilko* issue. *Byrd* v. *Dean Witter Reynolds, Inc.*, 726 F.2d 552 (9th Cir.), *cert. granted*, — U.S. —, 104 S.Ct. 3509, 82 L.Ed. 2d 818 (1984).

state may not contravene the provisions of the FAA. Although it is substance and not form which controls the question of what constitutes a "security," typically, a franchise is not considered to be a security within the meaning of federal securities law. *Nash & Associates, Inc.* v. *Lum's, Inc.*, 484 F.2d 392 (6th Cir. 1973). In our view, the *Southland* court simply recognized that a franchise is not typically a security and rejected the attempted analogy between franchise regulation and securities regulation. The court did not reject, or even address, the question of whether the *Wilko* exemption from the FAA extended to state securities laws. It is hazardous to draw conclusions from nondispositive footnotes, but the rejection of the analogy at least suggests that had the analogy been accepted or had the California law concerned securities regulations, the *Wilko* exemption would have extended to the state law. For our purposes, it is enough to say that *Southland* is off point.

Petitioner also relies on *Scherk*, which dealt with an agreement between United States and foreign citizens to resolve any disputes in an international forum. On its facts, *Scherk* offers no guidance here. *Scherk* appears to rest on the pragmatic consideration that there is no international supremacy clause to resolve disputes about forum selection.

Petitioner also relies on *Kroog*. We agree that *Kroog* is on point but, for the reasons set forth herein, do not agree with the *Kroog* court.

Petitioner also relies on two Florida cases, *Melamed* and *Maves*. The issue in *Melamed* was whether the FAA superseded inconsistent provisions of the Florida arbitration code, sections 682.01 to 682.22, Florida Statutes (1979), which provided that an arbitration agreement was not enforceable if it incorporated the laws of another state. Although the facts of the case indicate that an interstate securities transaction was involved, the court did not address the issue of whether *Wilko* and Florida securities law controlled. We agree with the court's disposition of the issue as posed and see no conflict with our decision here. In *Maves* the court addressed the issue posed here but concluded that the Florida Securities Act

had no counterpart to the federal anti-waiver exemption established by *Wilko*. We disagree and disapprove *Maves*.

Finally, petitioner urges that in deciding this question we are obliged to look only at the FAA and that the issue is one involving arbitration, not securities regulations. We disagree. It is true that if we looked only at the text of the FAA we would find conflict between preemptive federal law and our decision here. What petitioner overlooks is that we are obliged not only to look at federal statutes but at controlling case law from the Supreme Court interpreting these statutes. In *Wilko* the Court interpreted both federal securities law and the FAA and held that the FAA did not require arbitration of disputes concerning interstate securities transactions. Thus, we see no conflict between our decision here and federal law.

The decision of the district court is approved.

It is so ordered.

BOYD, C.J., ADKINS, OVERTON AND ALDERMAN, JJ., Concur
EHRLICH, J., Dissents with an opinion in which MCDONALD, J., Concurs

EHRLICH, J., dissenting.

I dissent because I do not believe that section 517.241(3), which incorporates into Florida law the civil remedies provided by federal law, makes *Wilko* v. *Swan* a mandatory gloss on the state security laws under which this claim was raised.

I recognize that *Wilko* stands for the semantically and logically incongruous proposition that the choice of a forum is, in itself, a remedy. That decision was based on the protection expressed in section 14 of the Securities Act of 1933 (codified at 15 U.S.C. §77n): "Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with *any provision of this subchapter* or of the *rules and regulations of the Commission* shall be void." (Emphasis supplied.) The *Wilko* Court went on to find that the right to bring a claim in judicial proceedings is "a provision of this subchapter" which could not be waived. The Court there, it

must be remembered, balanced a general arbitration act against a specific anti-waiver protection, and applied the rule of statutory construction that a specific provision controls over a general one. Thus, the section which specifically addressed *federal* securities regulation controlled over a *federal* statute which generally authorized arbitration.

If the Florida legislature intended to provide anti-waiver protection through section 517.241(3), it did so in an oblique and confusing way. The general incorporation of a body of law that includes a federal anti-waiver provision which, by its very terms, limits its applicability to that specific subchapter of federal law and the rules and regulations of the SEC, cannot, it seems clear to me, control over the specific authorization of arbitration in Florida law. To the extent the incorporation of the anti-waiver provision is incorporated into Florida law, it is still expressly limited to those claims asserting federal civil remedies, not those, like the one now before us, arising from state law.

I would disapprove the decision of the district court below and approve *Maves* and *Melamed*.

McDONALD, J., Concurs

APPENDIX B

APPENDIX B

MARCIA YOUNG,

Petitioner,

—v.—

OPPENHEIMER & COMPANY, INC.,

Respondent.

No. 82-2282

District Court of Appeal
of Florida, Third District

July 20, 1983

Bailey & Dawes and Jesse C. Jones and Mercedes C. Busto, for petitioner.

Paul, Landy, Beiley, Harper & Metsch and Richard E. Brodsky, for respondent.

Before SCHWARTZ, C.J. and DANIEL S. PEARSON and FERGUSON, JJ.

FERGUSON, Judge.

Petitioner, Mrs. Young, brought an action in the United States District Court against respondent, Oppenheimer & Company, Inc., alleging violations of the Florida and federal securities laws. On motions of Oppenheimer, the court dismissed petitioner's original and amended complaints. Respondent subsequently filed an answer and affirmative defenses to petitioner's second amended complaint. In the federal action, there were no efforts, by motion or otherwise, to compel arbitration of the state claims even though it was later determined that the federal and state claims were severable. Thereafter, the federal court dismissed the state claims for the reason that there was no justification for the exercise of pendent jurisdiction, citing *Stowell* v. *Ted S. Finkel Investment Services, Inc.*, 489 F.Supp. 1209 (S.D. Fla. 1980), *aff'd*, 641 F.2d 323 (5th Cir. 1981).

Petitioner then filed her state statutory and common law claims in the state court. Respondent moved to compel arbitration, invoking the Florida Arbitration Code and the Federal Arbitration Act. The trial court entered an order which (1) compelled arbitration, (2) stayed the court

proceedings, and (3) retained jurisdiction to permit petitioner an opportunity to show that respondent was dilatory or unreasonable in its tactics, to her prejudice.

By this Petition for Writ of Certiorari, petitioner seeks review of the order compelling arbitration, raising three points as departures from the essential requirements of the law: (1) Oppenheimer waived its purported right to arbitration; (2) petitioner's state claims are not arbitrable; (3) a provision in the securities agreement restricting venue to New York City is unreasonable and invalid.

The dispositive questions as succinctly phrased and answered by the trial court are:

> Does the Federal Arbitration code apply? Does it prevail over the State Arbitration Code and over the State Local Laws? My answer is yes in light of the case of *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Melamed*, 405 So.2d 790 (Fla. 4th DCA 1981) and the Third District case in *Weir* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 416 So.2d 872 (Fla. 3d DCA 1982) which has incorporated that viewpoint at least at this point.[1]

In so holding, the trial court overlooked the controlling decision of this district in *Shearson, Hammill & Co., Inc.* v. *Vouis*, 247 So.2d 733 (Fla. 3d DCA), *cert. denied*, 253 So.2d 444 (Fla. 1971), which is directly contrary to *Melamed*. Although the *Vouis* opinion has been the subject of some criticism in other districts, today we reaffirm the conclusion, if not the rationale, of that decision. *Vouis* holds broadly that (1) arbitration of alleged fraud, misrepresentation and breach of fiduciary duties in not consistent with the policy and language of the Florida Securities Act, which will control over provisions of the Florida Arbitration Code, and (2) agreements to arbitrate controversies in the future cannot

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[1] *Weir* is a per curiam denial of certiorari on authority of *Melamed* without an opinion. Because *Melamed* has several holdings and turns on the significant facts, the *Weir* case is without precedential value.

oust the courts of jurisdiction conferred upon them by organic law.[2]

That arbitration of such claims is inconsistent with the Florida Securities Act[3] is made clear by Section 517.241(3) of the Act, which expressly provides an aggrieved person the same civil remedies provided by laws of the United States for the purchase or seller of securities which travel in interstate commerce. Section 517.241(4) limits the jurisdiction of the

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2 We reaffirm *Vouis'* first holding not as a broad statement of law but as applied to claims arising out of interstate securities transactions which are brought pursuant to the Florida Securities Act. The second holding is the principle adopted by the United States Supreme Court in *Wilko* v. *Swan, infra,* to justify invalidation of compulsory arbitration provisions in interstate securities agreements; it remains viable in state law only because the Florida Securities Act provides the same remedy as federal law. This second holding of *Vouis* has been abandoned by state courts in other kinds of cases, see, e.g., *Post Tensioned Engineering Corp.* v. *Fairways Plaza Associates,* 412 So.2d 871 (Fla. 3d DCA), *rev. denied,* 419 So.2d 1197 (Fla. 1982); *Collier Land Corp.* v. *Royal Palm Beach Realty, Inc.,* 338 So.2d 859 (Fla. 3d DCA 1976), *cert. denied,* 348 So.2d 945 (Fla. 1977), except where arbitration has been waived, *see, e.g., Klosters Rederi A/S* v. *Arison Shipping Co.,* 280 So.2d 678 (Fla. 1973), *cert. denied,* 414 U.S. 1131, 94 S.Ct. 869, 38 L.Ed.2d 755 (1974); *Lapidus* v. *Arlen Beach Condominium Association, Inc.,* 394 So.2d 1102 (Fla. 3d DCA 1981).

3 The Florida Securities Act, §517.241(2), (3) and (4), Fla. Stat. (1981) provides:

517.241 Remedies.—

(2) Nothing in this chapter shall limit any statutory or common-law right of any person to bring any action in any court for any act involved in the sale of securities or the right of the state to punish any person for any violation of any law.

(3) The same civil remedies provided by laws of the United States for the purchaser or seller of securities under any such laws, in interstate commerce, shall extend also to purchasers or sellers of securities under this chapter.

(4) When not in conflict with the Constitution or laws of the United States, the courts of this state have the same jurisdiction over civil suits instituted in connection with the sale or offer of sale of securities under any laws of the United States as they may have under similar cases instituted under the laws of the state.

state courts to those civil suits, in connection with the sale of interstate securities, where there is no conflict with the jurisdiction of federal courts.

In *Vouis*, this court held that the Florida Securities Act will control over the Florida Arbitration Code to the extent of a conflict between them. For this proposition, the court relied on *Wilko* v. *Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953), which held that the provision of the federal Securities Act prohibiting arbitration[4] would control over the more general Federal Arbitration Act.[5] *Vouis* is consistent with *Wilko* in that it insures to a person aggrieved in a securities transaction, whether buyer or seller, a judicial forum to hear a claim unless the aggrieved person agrees to arbitration *after* the claim has arisen. The Federal Arbitration Act does not apply to compel arbitration of claims arising out of interstate commerce transactions which are filed in federal court because federal law precludes a pre-sale waiver of the statutory right to a judicial determination of such claims. The longstanding justification for the federal law is thus stated in *Wilko*:

> While a buyer and seller of securities, under some circumstances, may deal at arm's length on equal terms, it is clear

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[4] The Securities Act of 1933 §14, 15 U.S.C. §77 n (1976), provides:

> Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter . . . shall be void.

This specific provision was held to control over the Federal Arbitration Act, 9 U.S.C. §2 (1976).

[5] In *Raymond, James & Associates, Inc.* v. *Maves*, 384 So.2d 716 (Fla. 2d DCA 1980), the Second District specifically rejected the reasoning of *Vouis*. The *Maves* court claimed that *Wilko* was not dispositive in Florida, since that case dealt with federal securities law, and specific federal statutory requirements which have no Florida counterpart. We respectfully disagree, and find that the provisions of Sections 517.241(2) and (3) are specific counterparts of the federal securities law prohibiting a pre-sale arbitration agreement in the sense that the Florida Securities Act expressly provides that the remedy shall be the same as that provided by federal law.

that the Securities Act was drafted with an eye to the disadvantages under which buyers labor. Issuers of and dealers in securities have better opportunities to investigate and appraise the prospective earnings and business plans affecting securities then [*sic*] buyers. It is therefore reasonable for Congress to put buyers of securities covered by that Act on a different basis from other purchasers. *Wilko* v. *Swan*, 346 U.S. at 435, 74 S.Ct. at 186-187.

In deciding the question of the enforceability of an agreement to arbitrate, the *Vouis* Court considered only the Florida Securities Act and the Florida Arbitration Code. In *Melamed*, the Fourth District was presented with a slightly different issue—whether an agreement to arbitrate which incorporates the law of another jurisdiction is valid in Florida. This case is factually more akin to *Vouis* than *Melamed* because the arbitration agreement here does not incorporate the law of another jurisdiction.[6] We stop to analyze *Melamed* because, as respondent suggests, the same conclusion is compelled despite the absence of a clause incorporating another state's law.

The *Melamed* court found that under the Florida Arbitration Code, an otherwise valid arbitration agreement is not enforceable if it incorporates the law of another state.[7] The

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6 The securities agreement in *Melamed* incorporated the law of the state of New York. The contract in this case provides that the rules of the New York Stock Exchange, Inc. shall govern arbitration. A provision that certain arbitration rules shall apply is considered one which merely expresses the method to be followed, and is not a stipulation that the Florida Arbitration Code shall not apply. *Post Tensioned Engineering Corp.* v. *Fairways Plaza Associates*, 412 So.2d at 874, citing *Hall* v. *Nationwide Mutual Insurance Co.*, 189 So.2d 224 (Fla. 4th DCA 1966).

7 *See* Florida Arbitration Code §682.02, Fla. Stat. (1981). However, even if the agreement did not incorporate the laws of another state, any arbitration agreement involving securities transactions in interstate commerce would be unenforceable under Sections 517.241(2) and (3), as previously discussed. Thus, while *Melamed* is factually distinguishable from *Vouis*, we think the result would be the same in either case, *i.e.*, both federal law, and the Florida law which borrows federal law,

court then reasoned that this result would be inconsistent with the Federal Arbitration Act, which makes an arbitration provision in an agreement involving interstate commerce "valid, irrevocable, and enforceable" unless the agreement would be revocable for a reason at law or equity.[8] Applying preemption principles, *Melamed* held that state courts may not refuse to enforce an arbitration clause that is valid under federal law merely because the clause is unenforceable under state law. To discourage unfair forum shopping, the court found that the existence of the right to arbitrate "should not depend on whether the case is before a state or federal tribunal." 405 So.2d at 793.

We are entirely in agreement with *Melamed* as to these general statements of law. However, we disagree with the *Melamed* court that such an agreement would be valid under federal law. The provisions of the Federal Arbitration Act cited in *Melamed* are not applicable to the federal securities law. *Wilko* v. *Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953). As the Supreme Court noted in *Wilko*, the Federal Securities Act expressly prohibits a pre-sale waiver of the right to a judicial determination of securities claims. Because Florida law extends the same civil remedies to purchasers and sellers of securities in interstate commerce as the laws of the United States, an arbitration agreement which is unenforceable under United States law is also unenforceable in Florida. *Melamed*, it appears, reaches a contrary result by creating rather than resolving inconsistency between state and federally created rights.

Respondent's preemption argument thus fails. Preemption is essentially a conflict-of-laws question; it exists where state law has been supplanted by substantive federal law so that federal law must be applied to determine the merits of a plaintiff's claim. *Central National Bank of Miami* v. *Central Bancorp, Inc.*, 411 So.2d 358 (Fla. 3d DCA 1982); *see also*

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render unenforceable any pre-sale arbitration agreement involving securities transactions in interstate commerce.

8 Federal Arbitration Act, 9 U.S.C. §2 (1976).

Societe Generale de Surveillance, S.A. v. *Raytheon European Management & Systems Co.*, 643 F.2d 863 (1st Cir. 1981); 1A *Moore's Federal Practice*, ¶ 0.160[4] at 237 (2d ed. 1983). The Florida Securities Act is drafted meticulously so as to avoid conflict with federal law governing securities transactions with respect to both remedy and the exercise of jurisdiction. Since there is facially no inconsistency between the federal securities law and the state securities act, as we construe it, and no necessity to apply federal law to determine the merits of the complaint, no preemption problem exists.[9] The federal government's power under the Commerce Clause to regulate commerce does not exclude all state power of regulation. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware*, 414 U.S. 117, 94 S.Ct. 383, 38 L.Ed.2d 348 (1973).

We have no quarrel with, and find distinguishable, authorities which hold that the Federal Arbitration Act applies to compel arbitration of claims filed in state courts based on agreements which affect interstate commerce *other than those involving sales of securities. See, e.g., Ross Stebbins, Inc.* v. *Nystrum*, 422 So.2d 1105 (Fla. 4th DCA 1982) (contract for employment of stockbroker); *Lipton Professional Soccer, Inc.* v. *Mijatovic*, 416 So.2d 1236 (Fla. 1st DCA 1982) (collective bargaining agreement incorporating New York law).

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9 After this opinion was prepared for release, respondent called to our attention *Kroog* v. *Mait*, 712 F.2d 1148 (7th Cir. 1983) a case which reverses the District Court and holds to the contrary. We disagree with *Kroog*.

Because we find no compulsion to arbitrate, we need not decide whether there was a waiver of arbitration in the federal court or whether the provision in the contract requiring that arbitration take place in New York is unconscionable.

Certiorari is granted; the order compelling arbitration is quashed and the cause remanded for judicial proceedings.

APPENDIX C

APPENDIX C

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

Case No. 82-11953 (21)

MARCIA YOUNG,

Plaintiff,

—vs.—

NED ELGART, et. al.,

Defendant.

ORDER ON MOTION TO COMPEL ARBITRATION

The motion of Oppenheimer & Co., Inc. having come on to be heard and this Court having provided each side an opportunity to, through two extensive hearings, present their respective positions; and the Court having heard arguments of counsel, reviewed the pleadings and attachments and being further advised in the premises, it is hereby

ORDERED AND ADJUDGED as follows:

1. Court finds that there are really no evidentiary issues involved; these are all matters of conceded fact, and it becomes a question of law for the court to decide.

2. The issues for determination are as follows:

(a) Does the Federal Arbitration Code apply? Does it prevail over the State Arbitration Code and over the State Local Laws? My answer is yes in light of the case of *Merrill, Lynch, Pierce, Fenner & Smith Inc.* vs. *Melamed,* 405 So.2d 790 (Fla. 4th DCA 1981), and the Third District case *Weir* v. *Merrill, Lynch, Pierce, Fenner & Smith, Inc.,* 416 So.2d 872 (Fla. 3d DCA 1982) which has incorporated that viewpoint, at least at this point.

As a constitutional officer I am duty-bound to follow the case law as opposed to what I think it should be, noting also that Plaintiffs concede that the issue of interstate commerce is

involved, I have no alternative but to state that the Federal Arbitration Code applies.

(b) Number 2, which was not raised by the Plaintiff, but which I will raise, does the Federal Arbitration Code apply to all the issues raised in this case? In other words, does the Arbitration Provision apply to all issues? In reviewing the language of it in the utilization of the word transaction, which is known to be a generic term (see, the Florida Rules of Civil Procedure and the interpretation of the word transaction) I rule as a matter of law that all claims raised by the complaint are covered by the arbitration provision.

(c) Has the defendant raised or "taken any position which is inconsistent"?

Utilizing the language of *Klosters Rederi* v. *Arison Shipping Company*, 280 So.2d 678 (Fla. 1973) a decision in which the Supreme Court utilized the language, "a party's contract right may be waived by actively participating in a lawsuit or taking action inconsistent with that right," the issue in this particular case becomes whether or not the Defendant took an inconsistent position in Federal Court in light of its failure to raise that issue.

It is this Court's viewpoint that the Defendant has not taken an inconsistent position in light of the established case law of *Sawyer* v. *Raymond James and Associates*, 642 F.2d 791 (5th Cir. 1981) in not raising that issue. It would be difficult for this Court to second guess a defense lawyer in this particular case for not raising it when he was placed in what this Court considers to be a Catch 22 position.

(d) The last issue for the court is whether or not there is any reason that the Arbitration provision is unreasonable at law or at equity. That is the actual language of the Federal Arbitration Code. The Plaintiff has raised that issue in terms of unconscionability. It is the viewpoint of this Court that in light of case law cited by defense counsel, that the Arbitration provision is reasonable.

3. WHEREFORE, it is further considered, ordered and adjudged as follows:

(a) the motion to compel arbitration is granted;

(b) the ore tenus motion of the Defendant Oppenheimer & Co., Inc. to stay this proceeding pending arbitration is hereby granted;

(c) the Court retains jurisdiction of this cause as it relates to Oppenheimer & Co., Inc., and if the Plaintiff, upon good faith, can show that Oppenheimer & Co., Inc. is somehow dilatory or unreasonable in its tactics in arbitration, this Court will consider lifting this stay.

DONE AND ORDERED in Chambers in Miami, Dade County, Florida this 4th day of October, 1982.

THOMAS E. SCOTT

Circuit Court Judge

Copies furnished to:

Steven R. Brownstein, Esq.
Mercedes Busto, Esq.
Patricia Cowart, Esq.
Curtis Carlson, Esq.
Jerald Freshman, Esq.

APPENDIX D

APPENDIX D

IN THE SUPREME COURT OF FLORIDA

Case No. 64,140

OPPENHEIMER & CO., INC.,

Petitioner,

—v.—

MARCIA YOUNG,

Respondent.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Oppenheimer & Co., Inc., hereby appeals to the Supreme Court of the United States from the decision of the Supreme Court of Florida, entered in this action on September 27, 1984, in which the Supreme Court of Florida affirmed the decision of the Court of Appeals for the Third District of Florida quashing the trial court's order compelling arbitration.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Respectfully submitted,

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By:_____
RICHARD E. BRODSKY

FILED NOVEMBER 30, 1984

[CERTIFICATE OF SERVICE OMITTED]

APPENDIX E

APPENDIX E

Constitutional and Statutory Provisions Involved

1. The Supremacy Clause, U.S. CONST. art. VI, cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. The Federal Arbitration Act, 9 U.S.C. §§1-3 (1976)

§1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

§2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising

out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

3. The Securities Act of 1933, 15 U.S.C. §§77n and 77p (1976)

§14. Contrary stipulations void

Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this title or of the rules and regulations of the Commission shall be void.

§16. Additional remedies

The rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity.

4. The Florida Securities Act, §517.241, FLA. STAT. (1981)

517.241 Remedies

(1) Any person aggrieved by a final order of the department may have said order reviewed as provided by chapter 120, the Administrative Procedure Act.

(2) Nothing in this chapter shall limit any statutory or common-law right of any person to bring any action in any court for any act involved in the sale of securities or

the right of the state to punish any person for any violation of any law.

(3) The same civil remedies provided by laws of the United States for the purchaser or seller of securities under any such laws, in interstate commerce, shall extend also to purchasers or sellers of securities under this chapter.

(4) When not in conflict with the Constitution or laws of the United States, the courts of this state have the same jurisdiction over civil suits instituted in connection with the sale or offer of sale of securities under any laws of the United States as they may have under similar cases instituted under the laws of the state.